

Application No. 10/509,471

**REMARKS**

Favorable reconsideration and allowance of the subject application are respectfully requested. Claims 21, 23-28, and 30-43 are pending in the present application, with claims 21 and 43 being independent.

***Interview Summary***

Applicant's representative would like to thank the Examiner Samson Lemma for the telephonic interview that was conducted on March 18, 2009. During the interview, Applicant's representative noted to the Examiner that the cited art failed to teach or suggest the claimed features of the present invention. The Examiner agree at least that claim 30 was not taught by the cited art. In addition, Applicant's representative also emphasized that the cited art completely fails to teach or suggest the feature "wherein the acquiring of numerical data includes analyzing both a reflected portion and a transmitted portion using at least one of a spectroscopic analysis and a scattered-light-spectroscopic analysis."

In addition, in an effort to clarify the record, Applicants respectfully request that the Examiner provide an Interview Summary Form, as requested.

***Claim Rejections under 35 U.S.C. §103***

The Examiner rejected: claims 21, 23-28 and 30-42 under 35 U.S.C. §103(a) as being unpatentable over Marius (DE 10123561) in view of Bolle (US 2004/0042642) and further in view of Einighammer et al. (US 2006/005661); and claim 43 under 35 U.S.C. §103(a) as being unpatentable over Marius (DE 10123561) in view of Einighammer et

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al. (US 2006/005661). These rejections are respectfully traversed insofar as they pertain to the presently pending claims.

First, Applicants respectfully submit that the reference identified by the Examiner as being US 2006/005661 (Einighammer) cannot be considered prior art under any section of 35 U.S.C. 102. US Publication 2006/005661 (U.S. Application No. 10/480,907) is a 371 National Stage of PCT application No. PCT/DE01/01861, which was first published in German and was published in English on March 16, 2006. Furthermore, U.S. Application 10/480,907 has a 371 date of July 25, 2005, which is after Applicant's priority date of May 14, 2003.

35. U.S.C. 102(e) clearly recites in part

A person shall be entitled to a patent unless -

(e) the invention was described in - (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for the purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the **English language**; (Emphasis added)

Thus, it is clearly evident that the US Publication No. 2006/005661 cannot be considered prior art, and Applicants respectfully request that the Examiner cite the proper reference document in order to clarify the record.

Therefore, because U.S. Publication No. 2006/005661 cannot be considered prior art, and by virtue of the Examiner's combination, it is clear that Merbach et al. alone fails to teach or suggest all of the features of the independent claims.

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The dependent claims should be considered allowable at least for depending from an allowable base claim.

In addition, Applicants also respectfully request that the Examiner, in any subsequent office action, correct the record. For example, on page 3 of the outstanding office action, claim 43 is referred to as a "dependent claim." In addition, the examiner failed to make any comment with respect to the feature of "wherein a first wavelength is 678 nm and a second wavelength ranges from 808 nm to 835 nm, the first wavelength representing light to acquire at least one of the plurality of images and the second wavelength representing light to acquire at least one other of the plurality of images," as recited in claim 43. Thus, claim 43 should clearly be considered allowable.

Accordingly, withdrawal of the rejection is respectfully requested.

### CONCLUSION

Applicants have made a diligent effort to place the claims in condition for allowance. However, should there remain unresolved issues that require adverse action, it is respectfully requested that the Examiner telephone Martin R. Geissler, Applicants' Attorney at 1.703.621.7140 so that such issues may be resolved as expeditiously as possible.

For these reasons, and in view of the above amendments, this application is now considered to be in condition for allowance and such action is earnestly solicited.

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If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 50-3828 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

**Date: June 24, 2009**

Respectfully Submitted,



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